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COMMENTS

THE GOVERNMENTAL IMMUNITY DOCTRINE IN TEXAS — AN ANALYSIS AND SOME PROPOSED CHANGES

by Glen A. Majure, W. T. Minick and David Snodgrass

Governmental immunity is one of the more ancient of the common law rules. The doctrine deprives the judiciary of power to adjudicate disputes against the government, the theory being that the sovereign is above the courts and thus not susceptible of being sued in its own courts.

Sovereign immunity, as it developed in England, was a logical extension to the concept of the divine right of kings, but the transplantation to America is a philosophical paradox. Being a common law doctrine, governmental immunity was first introduced in the United States in *Mower v. Inhabitants of Leicester*.¹ This was a quarter of a century after the American Constitution had set out a government of limited powers. Thus, the philosophical underpinnings of sovereign immunity did not apply to the United States when it was introduced to this country.

Nevertheless, the doctrine won rapid and widespread acceptance in the United States, primarily through court decision. The first reported Texas case on point adopted governmental immunity without citation of authority.² The court apparently believed that the immunity of the government was so commonly accepted that citation of authority was superfluous.

Although governmental immunity remains solidly entrenched in most American jurisdictions, a definite trend toward abrogation of the doctrine has developed. While it is impossible to point to a specific date, the passage of the Federal Torts Claims Act³ in 1945 signaled the beginning of the retreat from strict adherence to the immunity doctrine.

In recent years the Texas Legislature has considered several measures aimed at abrogating the doctrine, or at least ameliorating some of its harsh effects. In view of the current interest in this area, the purpose of this Comment is to examine the status of governmental immunity in Texas, to determine the constitutional power of the legislature to act in this area, to analyze the developments in the remaining forty-nine states, and to suggest basic standards which should be embodied in any future legislation.

I. THE GOVERNMENTAL IMMUNITY DOCTRINE IN TEXAS

The state of Texas is shielded from tort claims by two basic principles of law. First, the state as a sovereign cannot be sued without its consent.⁴ Secondly, assuming such consent is given by the legislature, the state never-

¹ 9 Mass. 247 (1812).

² *Hosner v. DeYoung*, 1 Tex. 764 (1847).

³ FEDERAL TORT CLAIMS ACT, 28 U.S.C. §§ 2671-2680 (1964).

⁴ *Texas-Mexican Ry. v. Jarvis*, 80 Tex. 456, 15 S.W. 1089 (1891); *State v. Snyder*, 66 Tex. 687, 18 S.W. 106 (1886); *Hosner v. DeYoung*, 1 Tex. 764 (1847); *Giddens v. Williams*, 265 S.W.2d 187 (Tex. Civ. App. 1954), *error ref. n.r.e.*

theless is not liable for the torts of its agents or employees.⁵ The two rules combine to deny effectively any recourse against the state when one of its agents or employees tortiously injures a private citizen.

State Immunity from Suit. The principle of state immunity from suit has been applied by the courts in a rather mechanistic manner. The earlier cases indicate that the courts had some difficulty in determining exactly what constituted a suit against the state, but this point was settled over thirty years ago in *San Antonio Independent School District v. Board of Education*.⁶ In that case, the court set forth the following generally accepted test: "[T]he rule is that a suit against an officer or department or agency of the state, the purpose or effect of which is to impose liabilities upon, or enforce liabilities against, the state, is in effect a suit against the state"⁷ This broad language protects from suit virtually any non-private agency created under the state constitution or state statutes.

Several exceptions to the immunity of the state from suit have been preserved. These include a suit compelling a state officer, agent, or employee to perform a ministerial duty,⁸ enjoining a state officer from acting unconstitutionally,⁹ asserting a crossclaim related to the initial claim of the state,¹⁰ and alleging a claim under the condemnation clause of the Texas Constitution.¹¹ With the possible exception of the inverse condemnation claims,¹² these exceptions afford little assistance to a claimant injured by the negligence of state agents or employees.

The barrier which protects the state from suit is not insurmountable, even though it is often difficult to overcome. In 1967 the legislature passed twenty-one enabling resolutions (five of which appeared to sound in tort) authorizing suit against the state in individual cases.¹³ Thus, the legislature has shown a willingness to pass such resolutions, but the cost to the claimant in both time and money is often excessive.¹⁴ These resolutions do not constitute acceptance of liability by the state,¹⁵ and all defenses on behalf of the state generally are reserved in each resolution.¹⁶ Furthermore, the claimant must be certain that the resolution embodies the theory upon

⁵ *Texas Highway Dept. v. Weber*, 147 Tex. 628, 219 S.W.2d 70 (1949); *State v. Hale*, 136 Tex. 29, 146 S.W.2d 731 (1941); *State v. Isbell*, 127 Tex. 399, 94 S.W.2d 423 (1936); *Welch v. State*, 148 S.W.2d 876 (Tex. Civ. App. 1941), *error ref.*; *State v. Brannan*, 111 S.W.2d 347 (Tex. Civ. App. 1938), *error ref.*; *State v. Flowers*, 94 S.W.2d 193 (Tex. Civ. App. 1936).

⁶ 108 S.W.2d 445 (Tex. Civ. App. 1937).

⁷ *Id.* at 448.

⁸ *Laidlaw v. Marrs*, 114 Tex. 561, 273 S.W. 789 (1925); see TEX. REV. CIV. STAT. ANN. art. 1735 (1964).

⁹ *Constantin v. Smith*, 57 F.2d 227 (E.D. Tex. 1932).

¹⁰ *Anderson & Clayton Co. v. State*, 122 Tex. 530, 62 S.W.2d 107 (1933).

¹¹ TEX. CONST. art. I, § 17.

¹² The courts have considered several claims of property damage based upon the inverse condemnation argument. The claimants have met with little success where the damage was negligently done. See *Texas Highway Dept. v. Weber*, 147 Tex. 628, 219 S.W.2d 70 (1949).

¹³ 2 Tex. Laws 1967, at 2789, 2798, 2804, 2812, 2816, 2847, 2873, 2878, 2887, 2889, 2896, 2907, 2908, 2922, 2924, 2925, 2927, 2939, 2943, 2954, 2955, 2956.

¹⁴ Apparently, approximately one hour of legislative consideration is given such a resolution (excluding subcommittee hearings), but the claimant must often wait two years or more for consideration. See Schoenburn, *Sovereign Immunity*, 44 TEXAS L. REV. 151, 177-78 (1965).

¹⁵ *State v. Isbell*, 127 Tex. 399, 94 S.W.2d 423 (1936).

¹⁶ 2 Tex. Laws 1967, at 2789, 2873, 2896, 2908, 2922; Schoenburn, *supra* note 14, at 187.

which he wishes to sue because he will be limited to that theory at trial.¹⁷ The legislature may impose any restrictions it desires on the suit, and since such enabling resolutions are in derogation of the common law, they are strictly construed.¹⁸

State Immunity from Liability. Even though a resolution grants legislative consent for the state to be sued, a claimant still must overcome the immunity of the state from liability for the torts of its agents and employees.¹⁹ Such immunity is embodied in a rule of substantive law which, in effect, negates the doctrine of *respondeat superior* when a state agent or employee commits a tort.²⁰ The rule is frequently stated in terms of the governmental-proprietary function distinction.²¹ That is, the courts hold that the state is not liable for the torts of its agents committed in the performance of a governmental function.²² The implication is that the state is liable for torts committed in the performance of a proprietary function; however, such is not the case. Insofar as tort liability is concerned, the state performs no proprietary functions.²³

One Texas case seemingly lends support to the governmental-proprietary function distinction at the state level. In *State v. Elliott*²⁴ the plaintiff was injured on his job with the state-operated railroad. The court spoke of the proprietary nature of the railroad operation and held the state liable. But this case only appears to sound in tort, the actual rationale being that the state contracts with its employees to provide a safe place to work. The significance of this case, however, was weakened by enactment of the Workmen's Compensation Act.²⁵ The actual rule of state immunity from liability was set out clearly in *State v. Hale*:²⁶

That the state is not liable for the torts of its agents is not controverted. . . . [I]f the enabling act gave the legislative consent to sue only for consequential damages resulting from a negligent or tortious manner in which the highway was constructed, the consent thus given was a fruitless gesture, conferring the bare right to sue upon a *nonexistent cause of action*.²⁷

Thus, no cause of action against the state exists when a state agent or employee commits a tort. Consequently, absent a general tort claims act, the

¹⁷ *Hosner v. DeYoung*, 1 Tex. 764 (1847); *State v. El Paso Natural Gas Co.*, 300 S.W.2d 170 (Tex. Civ. App. 1957); *State v. Lindley*, 133 S.W.2d 802 (Tex. Civ. App. 1939), *error dismissed, judgment correct*.

¹⁸ *State v. Isbell*, 127 Tex. 399, 94 S.W.2d 423 (1936); *State v. El Paso Natural Gas Co.*, 300 S.W.2d 170 (Tex. Civ. App. 1957). Consent to suit may be withdrawn after the suit is instituted. *Producers' & Refiners' Corp. v. Heath*, 81 S.W.2d 533 (Tex. Civ. App. 1935), *error dismissed*.

¹⁹ *Texas Highway Dept. v. Weber*, 147 Tex. 628, 219 S.W.2d 70 (1949); *State v. Hale*, 136 Tex. 29, 146 S.W.2d 731 (1941).

²⁰ *Gotcher v. State*, 106 S.W.2d 1104 (Tex. Civ. App. 1937).

²¹ See text accompanying notes 34-36 *infra*.

²² *Martin v. Sheppard*, 145 Tex. 639, 201 S.W.2d 810 (1947); *State v. Morgan*, 140 Tex. 620, 170 S.W.2d 652 (1943); *State v. Isbell*, 127 Tex. 399, 94 S.W.2d 423 (1936).

²³ *State v. Brannan*, 111 S.W.2d 347 (Tex. Civ. App. 1937), *error ref.*

²⁴ 212 S.W. 693 (Tex. Civ. App. 1919), *error ref.*

²⁵ TEX. REV. CIV. STAT. ANN. arts. 8306-8309 (1964).

²⁶ 96 S.W.2d 135 (Tex. Civ. App. 1936), *aff'd*, 136 Tex. 29, 146 S.W.2d 731 (1941). In that case, the enabling resolution was construed to allow a claim under the condemnation clause of the Texas Constitution (TEX. CONST. art. I, § 17).

²⁷ 96 S.W.2d at 138 (emphasis added).

courts of Texas remain almost completely closed to tort actions against the state.

County Immunity. Theoretically, counties enjoy the same degree of immunity as the state. However, the rule granting to the county immunity from suit has been abrogated by the legislature.²⁸ Thus, the courts have jurisdiction to hear claims against counties, but tort claimants generally have been unsuccessful because of the rule that counties are immune from liability for the torts of their agents and employees. Like the state, counties have been found to perform no proprietary functions which would subject them to liability.²⁹ This immunity applies not only to counties, but also to drainage districts,³⁰ conservation and reclamation districts,³¹ and school districts.³² Thus, these political subdivisions are insulated from liability for the torts of their agents and employees to the same degree as the state.

Municipal Immunity. Municipalities, like counties, can sue and be sued by virtue of a general statute.³³ But municipalities have not been treated kindly by the courts. In regard to the substantive immunity of municipalities, the common law governmental-proprietary function dichotomy has been preserved.³⁴ The courts classify as a governmental function any act undertaken to further the "welfare of the public at large and . . . not voluntarily assumed just for the benefit of the people of some particular locality."³⁵ Consequently, municipalities are held liable for those torts committed by their agents or employees in the discharge of a proprietary function.³⁶

The ease with which the test is stated belies the difficulty of its application. The inquiry often results in an attempt by the court to balance the equities, and, as a result, this area of the law currently is in a highly confused condition. The municipal functions considered by the courts to be governmental in nature include constructing a storm sewer to carry off pollutants,³⁷ constructing and maintaining a cesspool,³⁸ operating a mu-

²⁸ TEX. REV. CIV. STAT. ANN. art. 1573 (1962).

²⁹ *Harris County v. Gerhart*, 115 Tex. 449, 283 S.W. 139 (1926).

³⁰ *Hodge v. Lower Colorado River Authority*, 163 S.W.2d 855 (Tex. Civ. App. 1942), *error ref. w.o.m.* "[D]istricts created under Sec. 59(a) of art. 16 of the constitution 'are political subdivisions of the state of the same nature and stand upon exactly the same footing as counties' . . . and consequently, are immune from liability for torts of their agents and employees." *Id.* at 857.

³¹ *Id.*

³² *Treadway v. Whitney Independent School Dist.*, 205 S.W.2d 97 (Tex. Civ. App. 1947); *Braun v. Trustees of Victoria Independent School Dist.*, 114 S.W.2d 947 (Tex. Civ. App. 1938), *error ref.* "[A] school district is purely a governmental agency. . . . It performs no proprietary functions . . ." *Id.* at 950.

³³ TEX. REV. CIV. STAT. ANN. art. 962 (1963).

³⁴ *Imperial Prod. Corp. v. City of Sweetwater*, 210 F.2d 917 (5th Cir. 1954).

³⁵ *Treadway v. Whitney Independent School Dist.*, 205 S.W.2d 97, 99 (Tex. Civ. App. 1947); *see Dilley v. City of Houston*, 148 Tex. 191, 222 S.W.2d 992 (1949); *City of Houston v. Quinones*, 142 Tex. 282, 177 S.W.2d 259 (1944); *City of Tyler v. Ingram*, 139 Tex. 600, 164 S.W.2d 516 (1942).

³⁶ Cases cited note 35 *supra*.

³⁷ *City of Gladewater v. Evans*, 116 S.W.2d 486 (Tex. Civ. App. 1938), *error ref.*

³⁸ *Gotcher v. City of Farmersville*, 137 Tex. 12, 151 S.W.2d 565 (1941).

nicipal airport,³⁹ maintaining a public park,⁴⁰ collecting garbage,⁴¹ and operating a hospital.⁴² On the surface, these classifications appear to be reasonably consistent, even though some activities seem designed to benefit a particular locale rather than the general public.

The confusion arises when the municipal activities classified as governmental are compared with those which the courts have found to be proprietary in nature. These proprietary functions include maintaining and operating a port,⁴³ maintaining a public park,⁴⁴ operating a street grader to clean gutters,⁴⁵ constructing a storm sewer,⁴⁶ building and maintaining streets,⁴⁷ supplying ice to city offices,⁴⁸ furnishing water to city residents,⁴⁹ and operating an electric power plant.⁵⁰ When the two classes of activities are compared, obvious inconsistencies appear. For example, maintaining a public park has been held, at different times, to be both a governmental and a proprietary function.⁵¹ If a municipality builds and maintains a storm sewer for the stated purpose of carrying off pollutants, it is protected because it is engaged in a governmental function.⁵² However, if the same storm sewer is built for the purpose of carrying off flood waters (which also spread disease and filth), the municipality may be held liable for its torts because it is engaged in a proprietary function.⁵³ The distinction is meaningless since the same potential for injury exists in either situation.

The courts have maintained considerable consistency when the claim asserted against the municipality has been based on nuisance. In such cases, numerous courts have imposed liability upon the municipality, even though the activity was classified as a governmental function. For example, cities have been held liable for flooding the land of a private citizen,⁵⁴ maintaining a dumping ground outside the city limits,⁵⁵ and constructing and operating a sewage disposal plant which gave off offensive odors and gases.⁵⁶ In *Parson v. Texas City*⁵⁷ the court of civil appeals flatly stated that a city is liable for maintaining a nuisance even though engaged in a govern-

³⁹ *Imperial Prod. Corp. v. City of Sweetwater*, 210 F.2d 917 (5th Cir. 1954); see TEX. REV. CIV. STAT. ANN. art. 46d-15 (1969).

⁴⁰ *Vanderfor v. City of Houston*, 286 S.W. 568 (Tex. Civ. App. 1926).

⁴¹ *Venter v. City of Ennis*, 283 S.W.2d 408 (Tex. Civ. App. 1955).

⁴² *City of Dallas v. Smith*, 130 Tex. 225, 107 S.W.2d 872 (1937); *Gartman v. City of McAllen*, 130 Tex. 237, 107 S.W.2d 879 (1937).

⁴³ *City of Orange v. Lacoste, Inc.*, 210 F.2d 939 (5th Cir. 1954).

⁴⁴ *Claitor v. City of Commanche*, 271 S.W.2d 465 (Tex. Civ. App. 1954). This case held unconstitutional a statute which attempted to exempt the city from liability for negligence in the operation of a public park.

⁴⁵ *City of Panhandle v. Byrd*, 130 Tex. 96, 106 S.W.2d 660 (1937).

⁴⁶ *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57 (1931).

⁴⁷ *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955).

⁴⁸ *City of Wichita Falls v. Lewis*, 68 S.W.2d 388 (Tex. Civ. App. 1933), *error dismissed*.

⁴⁹ *Boiles v. City of Abilene*, 276 S.W.2d 922 (Tex. Civ. App. 1955), *error ref.*; *City of River Oaks v. Moore*, 272 S.W.2d 389 (Tex. Civ. App. 1954), *error ref. n.r.e.*

⁵⁰ *City of Greenville v. Branch*, 152 S.W. 478 (Tex. Civ. App. 1912), *error ref.*

⁵¹ *Claitor v. City of Commanche*, 271 S.W.2d 465 (Tex. Civ. App. 1954) (proprietary); *Vanderfor v. City of Houston*, 286 S.W. 568 (Tex. Civ. App. 1926) (governmental).

⁵² *City of Gladewater v. Evans*, 116 S.W.2d 486 (Tex. Civ. App. 1938), *error ref.*

⁵³ *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57 (1931); *City of Waco v. Thompson*, 127 S.W.2d 223 (Tex. Civ. App. 1939), *error dismissed, judgment correct*.

⁵⁴ *City of Ennis v. Gilder*, 32 Tex. Civ. App. 351, 74 S.W. 585 (1903), *error ref.*

⁵⁵ *City of Coleman v. Price*, 54 Tex. Civ. App. 39, 117 S.W. 905 (1909), *error ref.*

⁵⁶ *City of Tyler v. House*, 64 S.W.2d 1007 (Tex. Civ. App. 1933).

⁵⁷ 259 S.W.2d 333 (Tex. Civ. App. 1953), *error ref.*

mental function.⁵⁸ Furthermore, no showing of negligence is required to maintain such an action.⁵⁹

Obviously, no general test of universal application, and but few generalizations, can be drawn from the many tort cases dealing with the liability of municipalities. Any statement of the governmental-proprietary function rule simply begs the question. As stated by one member of the Texas supreme court, some of the distinctions look "pretty silly."⁶⁰ The simple fact is that unless a claimant can allege a case of nuisance, the outcome of his suit is not predictable.

Summary. The difficult legal questions currently involved in asserting a simple tort claim against the state, county, or municipality require a critical re-evaluation of the law of governmental immunity. The inequities of the doctrine are readily apparent, and with some frequency the news media point out individuals having particularly meritorious claims who have been denied a remedy because of this antiquated body of law.⁶¹ As state and local governments become more active and ubiquitous, the number of such incidents is likely to increase.

The trend throughout the United States definitely is toward abrogation of the doctrine of governmental immunity, either in whole or in part. Perhaps this is because the arguments in favor of preserving it have lost their vitality. The proposition that the doctrine protects the state from nuisance suits is unproven at best. Those states which have abolished the doctrine have experienced no great raid on the public treasury. Furthermore, the doctrine is in derogation of the basic principle underlying all tort law; for every wrong there should be a remedy. In fact, the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."⁶² Thus, in future legislation, Texas should re-evaluate its position and should assume fully the constitutionally prescribed posture which its courts have so long emasculated.

II. THE CONSTITUTIONALITY OF A LEGISLATIVE RETREAT FROM GOVERNMENTAL IMMUNITY IN TEXAS

A multitude of constitutional provisions may affect legislative action to abrogate, wholly or partially, governmental immunity in Texas. It is thought that most constitutional limitations will determine only the directions that legislative action should take. The purpose of this discussion is solely to explore the constitutional power of the legislature to take *any* action which marks a retreat from governmental immunity from torts.

⁵⁸ *Id.* at 334. But the court did not find liability here, holding that a faulty traffic light was not a nuisance.

⁵⁹ *City of River Oaks v. Moore*, 272 S.W.2d 389 (Tex. Civ. App. 1954), *error ref. n.r.e.*; *City of Dallas v. Early*, 281 S.W. 883 (Tex. Civ. App. 1926), *error dismissed*.

⁶⁰ *Greenhill, Should Governmental Immunity for Torts Be Re-examined, and, if So, by Whom?*, 31 TEX. B.J. 1036, 1066 (1968).

⁶¹ *Dallas Morning News*, Jan. 28, 1969, § D, at 1, col. 4.

⁶² TEX. CONST. art. I, § 13.

Scope of Constitutional Inquiry. First, the scope of the constitutional problems relating to legislative abrogation of governmental immunity in Texas must be defined. In some jurisdictions the immunity of the state is established by the constitution itself, usually in the form of a directive that the state shall not be made a defendant in any action in the courts of the state.⁶³ Such is not the case in Texas, however, for immunity is derived from the common law.⁶⁴ As a common law doctrine, governmental immunity can be changed by the legislature or by the courts; thus, the constitutional prohibitions, if any, are indirect.

The scope of the constitutional limitations can be further narrowed by a basic understanding of the common law doctrine of governmental immunity in Texas. As discussed above, the doctrine actually consists of two immunities: (1) immunity from suit, and (2) immunity from liability. The courts usually define the immunity from suit in these words: The state cannot be sued in her own courts without her consent.⁶⁵ On the other hand, immunity from liability is commonly defined in this fashion: The state cannot be held liable for the torts of its officers, agents, or employees unless she expressly consents to such liability.⁶⁶ Clearly, the immunities do not apply if consent is obtained from the state. Thus, the narrowed constitutional questions are whether the state may give its consent in either case, and, if so, in what manner must such consent be given? Because the answers to these questions depend upon the nature of the immunity under consideration, the two immunities will be considered separately.

One further delimitation must be made. It has been stated that since the courts have never seriously questioned the constitutionality of special acts of the legislature waiving immunity (*i.e.*, giving consent), a general act would be constitutional.⁶⁷ The validity of this statement is of obvious importance, and it will be analyzed carefully in relation to the above questions.

Immunity from Suit. The principle of immunity from suit had its origin in the common law; therefore, the immunity apparently can be waived by statute or court decision. The Texas courts consider the waiving of immunity to be a legislative function and thus have not involved themselves with this problem.⁶⁸ The legislature, however, often has waived the immunity. Such statutory waiver of suit usually is embodied in a private bill which authorizes a named individual to proceed against the state.⁶⁹

⁶³ ALA. CONST. art. 1, § 14; ARK. CONST. art. 5, § 20; W. VA. CONST. art. 6, § 35.

⁶⁴ *Hosner v. DeYoung*, 1 Tex. 764 (1847).

⁶⁵ *State Life Ins. Co. v. Daniel*, 6 F. Supp. 1015 (W.D. Tex. 1934); *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838 (1958); *Hosner v. DeYoung*, 1 Tex. 764 (1847); *State v. Noser*, 422 S.W.2d 594 (1967), *error ref. n.r.e.*

⁶⁶ *Martin v. Sheppard*, 145 Tex. 639, 201 S.W.2d 810 (1947).

⁶⁷ See text accompanying notes 84-92 *infra*.

⁶⁸ As Justice Greenhill of the present Supreme Court of Texas noted in a recent article on governmental immunity, court abrogation would have to be all or nothing. On the other hand, the legislature could fix arbitrary limits, budget expenditures in advance, and define areas of immunity. Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, if So, by Whom?*, 31 Tex. B.J. 1036, 1070 (1968).

⁶⁹ An example of such a bill is contained in *State v. Hale*, 136 Tex. 29, 34, 146 S.W.2d 731, 735 (1941):

Section 1. That the consent of the Legislature of the state of Texas is hereby given

The power of the legislature to waive the immunity from suit through private bills, a practice which has existed in Texas since the Republic became a state, has never been questioned seriously. Among the numerous cases reaching the appellate level, no court has declared the private act granting consent to sue as unconstitutional. Academically, however, it appears that such private bills at least approach violation of several constitutional provisions.

First, section 3 of the Texas Bill of Rights⁷⁰ provides that all men have equal rights, a parallel to the fourteenth amendment of the United States Constitution⁷¹ providing for equal protection of the laws. The United States Supreme Court has said that equal protection of the laws requires "that [all persons] should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts"⁷² Thus, if the same interpretation applies to the Texas equal rights provision, ostensibly private acts conferring the right to sue the state are invalid. Pragmatically speaking, the legislature presently may grant or withhold permission to sue at its pleasure. Furthermore, no standard for determining who shall be given permission to sue can be gleaned from the private acts, and in this regard it appears that waivers of immunity from suit are granted on an arbitrary basis. Thus, by virtue of the private bills, some persons receive a right of access to the courts that is denied to other persons.

However, the Texas courts have not taken this position on the constitutionality of private acts which confer permission to sue. For example, in *Martin v. Sheppard*⁷³ the legislature passed a private act enabling Mrs. Martin to sue the State Highway Department for damages for injuries resulting in the death of her husband while in the employ of the Department. The act also provided that the action would be tried and determined according to the same rules of law and procedure as to liability and defense that would be applicable if such suit were against an ordinary Texas corporation (waiver of immunity from liability). This apparent attempt to waive immunity from liability was held violative of the equal rights provision of the constitution since Mrs. Martin was not subject to the same defenses that would be available to the state in a suit filed against it by any other person.⁷⁴ Thus, the court correctly applied the equal rights proviso to the attempted waiver of immunity from liability; yet, the court refused to apply the same reasoning to that portion of the private bill

to W.S. Hale and wife, Mary D. Hale, his executor, administrator and heirs to file and prosecute suit against the state of Texas and the State Highway Commission by reason of the alleged negligence in construction of State Highway No. 43 in and through Leon County, Texas, which construction was begun in July, 1927, and especially by reason of the constructing of said highway in such manner as to overflow and otherwise damage the lands of said Hale. Said suit shall be brought in Travis County, Texas.

⁷⁰ TEX. CONST. art. I, § 3: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to separate public emoluments, or privileges, but in consideration of public services."

⁷¹ U.S. CONST. amend. XIV, § 1.

⁷² *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

⁷³ *Martin v. Sheppard*, 145 Tex. 639, 201 S.W.2d 810 (1947).

⁷⁴ *Id.* at 812.

granting Mrs. Martin permission to sue the state. Moreover, the court stated that "[i]t cannot be questioned that the legislature had the power to grant relators permission to sue the state and to provide the manner of service."⁷⁵

That pronouncement by the supreme court apparently is now the law in Texas; however, if the present supreme court thought it necessary to abrogate the doctrine that the state cannot be sued without its consent, as the highest courts of so many other states have already done,⁷⁶ section 3 of the Texas Bill of Rights remains a convenient constitutional hook upon which to hang a decision.

Secondly, private bills granting permission to sue the state may violate the Texas constitutional provision forbidding the legislature to pass local or special laws. Article III, section 56⁷⁷ enumerates several items, including a prohibition against setting the jurisdiction of courts or changing the rules of evidence before any court or other judicial tribunal,⁷⁸ which may not be made the subjects of special enactments. Consent to sue is a jurisdictional conferment,⁷⁹ and if the special act provides a particular venue, as most acts do, then it seems that jurisdiction is being conferred on one court in violation of the constitutional provision. This was not the position taken by the court of civil appeals in *Martin v. State*.⁸⁰ In that case the plaintiff had been authorized, by special enactment, to sue the state "in a court of competent jurisdiction, in Jeff Davis County, Texas."⁸¹ After the trial court dismissed the action, the court of civil appeals reversed with the bland and erroneously authoritaded⁸² statement that "consent may be given to sue by special laws and that when so given, the acts are not violative of constitutional provisions against granting special privilege."⁸³

By upholding the special act, the court in *Martin v. State* may have neglected another provision of section 56. After listing the items which may not be made the subjects of special enactments, the section forbids any

⁷⁵ *Id.*

⁷⁶ See text accompanying notes 174-88 *infra*.

⁷⁷ TEX. CONST. art. III, § 56.

⁷⁸ *Id.* "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing:

Regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts"

⁷⁹ *Martin v. Sheppard*, 145 Tex. 639, 643, 201 S.W.2d 810, 812 (1947): "By virtue of [the private bill] and by the service of process and the appearance of the State through its Attorney General, the court clearly acquired jurisdiction of the parties to the litigation."

⁸⁰ 75 S.W.2d 950 (Tex. Civ. App. 1934).

⁸¹ S. Con. Res. 53, 43d Leg., Reg. Sess. 1016 (1933).

⁸² The court cites to footnote 45, 59 C.J. States § 460 (1932), which states that it is constitutional to provide consent to sue the state to assert a right previously possessed. The Texas case cited in that footnote, *State v. Elliott*, 212 S.W. 695 (Tex. Civ. App. 1919), held that the state was liable for its torts when engaged in a proprietary function. Thus, disregarding the merits of the *Elliott* decision, there was a previous right in that decision. The authority does not indicate the effect of giving consent to sue on a non-existent or doubtful claim as in *Martin v. State*. Additionally, reliance on *State v. Elliott* to any extent is questionable since that decision is a maverick among cases dealing with governmental immunity.

⁸³ *Martin v. State*, 75 S.W.2d 950, 952 (Tex. Civ. App. 1934).

other special enactment where a general law can be made applicable.⁸⁴ The holding of the court may indicate its belief that a general consent-to-sue statute could not be enacted. However, a better interpretation of the holding would be that a general consent could not be given on Martin's cause of action. Since Martin was the only person who could recover for his injuries, only he could be given consent to sue.

Based on the foregoing, the proposition that a general consent-to-sue statute is constitutional because special consents to sue are constitutional is academically weak. In practice, however, the premise may be strong indeed. The continued use and success of private consent-to-sue statutes indicates a willingness of the courts to suspend immunity where the state indicates such a desire, constitutional limitations notwithstanding.

A general waiver of the immunity from suit should be received even more hospitably than the private statutes. A general waiver does not violate equal protection since it is applicable to every citizen of the state. Likewise, by definition, it escapes the challenge of the special enactment provision. The multitude of cases which sanction consent to sue cannot be ignored. Thus, a general consent-to-sue statute must be assumed to be constitutional. To do otherwise would be to ignore Texas judicial and legislative history.

To a limited extent, general consent-to-sue statutes are already in use. It has been a practice in the creation of political subdivisions, such as counties,⁸⁵ municipalities,⁸⁶ road districts,⁸⁷ school districts,⁸⁸ navigation districts,⁸⁹ park boards,⁹⁰ and water supply districts,⁹¹ to provide that such subdivision may sue and be sued in the courts of the state. While this language may be interpreted to mean only that the political subdivision must be recognized as an entity capable of appearing in an action, several courts have assumed silently that the language constituted a waiver of immunity to suit as well.⁹²

Immunity from Liability. Assuming that consent to sue the state has been obtained, the plaintiff must still overcome the immunity of the state from liability.⁹³ This immunity has its own distinct policy and historical basis⁹⁴ and depends to no extent upon the immunity from suit. Generally, immunity from liability means that no right of action lies against the state

⁸⁴ "And in all other cases where a general law can be made applicable, no local or special law shall be enacted; . . ." TEX. CONST. art. III, § 56.

⁸⁵ TEX. REV. CIV. STAT. ANN. art. 1573 (1962).

⁸⁶ *Id.* art. 962 (1963).

⁸⁷ *Id.* art. 752r (1964).

⁸⁸ *Id.* art. 2767(b) (1965).

⁸⁹ *Id.* art. 8228 (1954).

⁹⁰ *Id.* art. 6079f, § 11 (1962).

⁹¹ *Id.* art. 7807f, § 9 (1954).

⁹² *Fylipoy v. Gulf Stevedore Corp.*, 257 F. Supp. 166 (S.D. Tex. 1966); *In re Nueces County, Texas, Road District No. 4*, 174 F. Supp. 846 (S.D. Tex. 1959); *Farmers State Bank v. Bowie County*, 127 Tex. 641, 95 S.W.2d 1304 (1936).

⁹³ The cases make it quite clear that obtaining consent to sue does not affect the non-liability of the state for torts. *In re Nueces County, Texas, Road District No. 4*, 174 F. Supp. 846 (S.D. Tex. 1959); *State v. Isbell*, 127 Tex. 399, 94 S.W.2d 423 (1936); *Brooks v. State*, 68 S.W.2d 534 (Tex. Civ. App. 1934), *error ref.*

⁹⁴ The distinction is discussed in the recent article by Justice Greenhill, note 68 *supra*.

for a tort committed by her officers, agents, and employees unless liability is expressly assumed by the state.⁹⁵ Thus the effect of expressly assuming liability is to create a right of action against the state.⁹⁶ Since the action will be worthless without funds to pay a judgment, the question of the power of the legislature to consent to liability necessarily encompasses the question of its power to appropriate funds in satisfaction of such liability.

Most of the cases which have denied liability for a tort committed by the state or its agents have stated that recovery depends upon whether the state has expressly assumed such liability (*i.e.*, waived immunity).⁹⁷ Since the courts have concluded almost unanimously that the state had not expressly assumed liability in each of the respective fact situations,⁹⁸ the question of whether the state *could* assume tort liability rarely has been put in issue. The cases which have turned on this question can be placed conveniently into two categories—retroactive and prospective assumptions of tort liability.

Retroactive Assumption of Tort Liability. Retroactive assumption of tort liability by the legislature takes the form of a private bill, and such assumption of liability usually is contained in the same special act which gives a particular individual consent to sue the state.⁹⁹ As noted previously,¹⁰⁰ the constitutionality of a private consent-to-sue statute has never been doubted; however, the assumption of liability by the state runs afoul of constitutional prohibitions not applicable to consent-to-sue statutes. Article III, section 44 of the Texas Constitution¹⁰¹ prohibits the grant or appropriation of state money to any individual making a claim which has not been provided for by pre-existing law. The term "pre-existing law" has been interpreted to mean that at the time the claim arose, there must have been in force a valid law such as would form the basis of a judgment

⁹⁵ *Texas Highway Dept. v. Weber*, 147 Tex. 628, 219 S.W.2d 70 (1949); *Martin v. Sheppard*, 145 Tex. 639, 201 S.W.2d 810 (1947); *State v. Dickerson*, 141 Tex. 475, 174 S.W.2d 244 (1943); *State v. Hale*, 136 Tex. 29, 146 S.W.2d 731 (1941).

⁹⁶ It is assumed herein that the legislature will adopt, if anything, an approach which will require a claimant to prove his claim before a court in order to obtain damages. Assumedly, the legislature could adopt a plan by which an administrative agency or even a legislative commission, would make all determinations. In such a case, the claimant stands or falls on that determination.

⁹⁷ See cases cited note 95 *supra*.

⁹⁸ Typical consent to suit bills provide that suit may be brought against the state "in order to ascertain, fix, and award the amount of money, if any, [that the claimants] 'are entitled to receive . . . as compensation by reason of such injuries and resulting damages.'" *State v. McKinney*, 76 S.W.2d 556 (Tex. Civ. App. 1934), *error ref.* It has been regularly held, even in the face of acknowledgment by the legislature that the damages resulted from negligence of state employees, that these words only entitle the claimant to test the matter of liability through the courts. See, *e.g.*, *Fonseca v. State*, 297 S.W.2d 199 (Tex. Civ. App. 1957). Apparently, the legislature must use the words "assume liability" or similar words of unequivocal meaning. See, *e.g.*, *Matkins v. State*, 123 S.W.2d 953 (Tex. Civ. App. 1939), *error dismissed, judgment correct*. This attitude on the part of the courts seems unnecessarily strict. Legislative consent to sue on facts which can only support a claim based on tort would seem adequate indication of the legislature's intent to assume liability.

⁹⁹ The private bill in *Matkins v. State*, 123 S.W.2d 953 (Tex. Civ. App. 1939), *error dismissed, judgment correct*, provided for consent to sue, venue, limitations, assumption of liability, and appropriation to pay the judgment.

¹⁰⁰ See text accompanying notes 68-92 *supra*.

¹⁰¹ TEX. CONST. art. III, § 44. "The legislature . . . shall not grant . . . by appropriation or otherwise, any amount of money out of the treasury of the state, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing laws; . . ."

against the state in a court of competent jurisdiction in the event the state should permit itself to be sued.¹⁰² Thus, section 44 requires the existence of a legal right to be free from the injury complained of (pre-existing law) *prior to* the happening of events which give rise to the injury (claim). Since the private bill creates the right of action *after* the claim arose, the requirements of section 44 are not met; thus funds may not be appropriated to pay the judgment of a successfully prosecuted action.¹⁰³ The courts have gone one step beyond this rather automatic application of section 44 and have held that the provision prevents even the granting of a right of action, as distinguished from the appropriation of funds, for a tort previously committed by the officers, agents, or employees of the state.¹⁰⁴ While the words of section 44 do not seem so demanding, the interpretation is reasonable; the creation of a right of action necessarily involves the creation of a right to collect on a judgment if a cause of action is successfully established by the plaintiff. Because appropriation to pay the judgment would be in violation of section 44, the right to proceed to judgment also must be unconstitutional.

Another interpretation of section 44 seems equally reasonable. Since the provision forbids only *appropriations*, the individual should be able to pursue a *right of action* granted by the legislature. If successful, the judgment upon finality becomes a new claim.¹⁰⁵ A later appropriation by the legislature to pay this claim would not be violative of section 44 since the state has no immunity from liability in an action on a final judgment rendered against the state (*i.e.*, there is pre-existing common law).¹⁰⁶

Prospective Assumption of Tort Liability. Assumption of liability for future torts clearly circumvents the prohibition contained in section 44 since the assumption is the pre-existing law for later claims. However, prospective assumption of liability must be undertaken on a general basis rather than through private legislation. Obviously, the legislature cannot provide a right of action for a particular individual on the speculation that at some future date that person will have a tort claim against the state. Thus, analysis of the constitutional effects on prospective assumption of liability must relate to the creation of a right of action which will apply generally to the public at large.

The chief constitutional threats¹⁰⁷ to general assumption by the state of liability for torts are the several provisions which deny power to the leg-

¹⁰² Austin Nat'l Bank v. Sheppard, 123 Tex. 272, 71 S.W.2d 242 (1934).

¹⁰³ Matkins v. State, 123 S.W.2d 953 (Tex. Civ. App. 1939), *error dismissed, judgment correct*.

¹⁰⁴ *Id.* The appeals court affirmed a lower court's decision, sustaining a general demurrer. Thus, the action was dismissed because it would have been unconstitutional to pay the judgment.

¹⁰⁵ See 34 TEX. JUR. 2d *Judgments* § 443 (1962).

¹⁰⁶ Martin v. Sheppard, 145 Tex. 639, 644, 201 S.W.2d 810, 813 (1947), *citing* Harkness v. Hutcherson, 90 Tex. 383, 38 S.W. 1120 (1897) and City of Sherman v. Langham, 92 Tex. 13, 40 S.W. 140 (1897).

¹⁰⁷ There are several constitutional questions concerning assumption of tort liability by the state which will not be treated herein. It is felt that the problems either are not serious enough to merit discussion or are resolved by the same considerations applicable to the following textual discussion. Some of the more important of these constitutional questions deserve listing in this footnote:

(a) If the legislature, through a Texas Tort Claims Act, prescribes the standards and me-

islature to grant public moneys to individuals. Article III, section 51 prohibits the state from granting public funds to "any individual, association of individuals, municipal or other corporations whatsoever . . ."¹⁰⁸ Section 52 of the same article denies the legislature power to authorize political subdivisions "to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company . . ."¹⁰⁹ Article XVI, section 6 states quite simply that "[n]o appropriation for private or individual purposes shall be made, unless authorized by [the] constitution."¹¹⁰

As noted previously,¹¹¹ the courts apparently have taken the position that if the appropriation is invalid, then the assumption of liability that gives rise to the appropriation also is invalid. Hence, these constitutional provisions, although relating to the appropriation of money and not to the granting of a right of action, may restrict the granting of a right of action.

The constitutional restraints against granting public money to individuals have not been applied strictly.¹¹² They have been held inapplicable where a governmental or public purpose for the expenditure exists.¹¹³ Consequently, it is not of controlling importance that a private person benefit from a particular expenditure so long as the grant is not a gift and is not intended for private purposes.¹¹⁴ An expenditure is not considered a gift if there is consideration flowing to the state; the benefits to the state in having a public purpose served by the expenditure provide the consideration for the expenditure.¹¹⁵ The ultimate question, therefore, is whether state money paid to an individual for damages sustained as a result of a state tort serves a public or governmental purpose.

The constitution has been amended on several occasions to authorize expenditures previously thought to be violative of the provisions prohibiting the the grant of public money to individuals. It is helpful to look at

chanics for presentation, consideration, determination, or adjudication, and subsequent payment of claims factually found to be meritorious under the Act, do such provisions amount to delegation of legislative power in violation of TEX. CONST. art. II, § 1?

(b) Does the purchase of insurance to pay for injuries sustained as a result of state tort constitute a giving or lending of the credit of the state in contravention of TEX. CONST. art. III, § 50? TEX. CONST. art. III, § 52 makes the same limitation applicable to municipal corporations.

(c) Would payment of damages to an individual injured as a result of a tort committed by a state employee constitute assumption by the state of the liability of the employee in violation of TEX. CONST. art. III, § 50?

(d) Does assumption by the state of liability for torts committed in the future constitute a creation of debt not specifically allowed in TEX. CONST. art. III, § 49?

(e) Does the levy and collection of taxes for the payment of damages suffered as a result of state inflicted torts constitute taxation for private purposes in violation of TEX. CONST. art. VIII, § 3?

¹⁰⁸ TEX. CONST. art. III, § 51.

¹⁰⁹ *Id.* art. III, § 52.

¹¹⁰ *Id.* art. XVI, § 6(a).

¹¹¹ See text accompanying notes 101-04 *supra*.

¹¹² These provisions were placed in the constitution in response to reconstruction period legislation "which was marked by profligacy." Interpretive Commentary, TEX. CONST. art. III, § 51. The need for such limitations has decreased as the legislature has become more responsible.

¹¹³ *City of Aransas Pass v. Keeling*, 112 Tex. 339, 247 S.W. 818 (1923); TEX. ATT'Y GEN. OP. No. V-1067 (1950).

¹¹⁴ TEX. ATT'Y GEN. OP. No. V-1067 (1950); TEX. ATT'Y GEN. OP. No. C-584 (1966).

¹¹⁵ TEX. ATT'Y GEN. OP. No. C-584 (1966).

the amendments to section 51 to identify what has been considered to be a private purpose or a gift. Article III, section 51 contains two internal exceptions: (1) aid to indigent and disabled Confederate soldiers and sailors or their widows, and (2) aid in cases of public calamity.¹¹⁶ Section 51a provides for monetary assistance to needy aged, needy blind, and needy children.¹¹⁷ Sections 51-e¹¹⁸ and 51-f¹¹⁹ authorize the legislature and incorporated cities and towns to pay retirement and disability pensions to municipal employees. Section 51g authorizes the legislature to appropriate money to provide social security coverage for proprietary employees of political subdivisions.¹²⁰ It is obvious from this quick survey of corrective amendments to section 51 that some purposes far more public than assumption of tort liability have been made the subject of constitutional authorization. This is by no means conclusive, however, since all the amendments were motivated by Attorney General Opinions rather than by court decision.¹²¹

More relevant are certain amendments which were adopted in response to court decisions. Sections 59, 60, and 61 of article III¹²² authorize the legislature to provide workmen's compensation insurance for state, county, and municipal employees, respectively. These sections were added to the constitution as a result of the Commission of Appeals' (Section B) decision in *City of Tyler v. Texas Employers' Insurance Ass'n.*¹²³ This case involved the applicability of the Workmen's Compensation Act to employees of an incorporated city. The Act provides compensation to employees for personal injuries sustained in the course of employment. If the Act applied to the city, it would have placed personal injury liability upon a political subdivision of the state—precisely the question of concern in this Comment.

The determinative issue in *Tyler* related to the intention of the legislature when it made the Act applicable to "corporations." After noting several grounds upon which it could be said that municipal corporations were not within the meaning of "corporations," the court further reasoned that the legislature would not have intended to enact an unconstitutional statute.¹²⁴ It was found that article III, section 52¹²⁵ would have been violated in two respects had the legislature intended the Act to apply to municipal corporations. First, the court stated that Texas Employer's Insurance Association was a corporation engaged in the insurance business on the mutual plan, and therefore, subscribers were stockholders in such corpora-

¹¹⁶ TEX. CONST. art. III, § 51.

¹¹⁷ *Id.* art. III, § 51a.

¹¹⁸ *Id.* art. III, § 51-e.

¹¹⁹ *Id.* art. III, § 51-f.

¹²⁰ *Id.* art. III, § 51g.

¹²¹ For an excellent example of the conservatism of the Attorney General's office in regard to the public-money-to-individual provisions during the amendment period, see TEX. ATT'Y GEN. OP. No. 2914 (1933). This opinion has been impliedly overruled by subsequent opinions, including TEX. ATT'Y GEN. OPS. Nos. V-1067 (1950) and C-584 (1966).

¹²² TEX. CONST. art. III, § 59; *Id.* art. III, § 60; *Id.* art. III, § 61.

¹²³ 288 S.W. 409 (Tex. Comm'n App. 1926).

¹²⁴ *Id.* at 411.

¹²⁵ TEX. CONST. art. III, § 52.

tion. In this regard, section 52 prohibits a city from becoming a stockholder in a corporation.¹²⁶ Second, the court stated:

[I]t is clear that to permit a municipal corporation to become a subscriber to the insurance association . . . authorizes it to grant public money by way of premiums for insurance in aid of its employees to whom it is under no legal liability to pay. As already pointed out, the act contemplates compensation in the absence of any legal liability other than the acceptance of the plan. Cities and towns have no power to appropriate the tax money of its citizens to such a purpose. It is at best a gratuity, a bonus to the employé. The city might as well pay his doctor's fee, his grocer's bill, or grant him a pension.¹²⁷

Clearly, the holding indicates the court's belief that payment of insurance premiums to provide compensation for injuries to state employees is the granting of public money to individuals in violation of section 52. This holding casts uncertainty upon the constitutionality of a general assumption of tort liability by the state. The creation of a right of action against the state for tortious injuries caused by the state through its employees appears to be so closely analogous to the application of the Workmen's Compensation Act to state employees as to belie distinction. In fact, the workmen's compensation scheme seems to have more constitutional justification on "public purpose" grounds than does assumption of liability by the state for its torts. The state has a master-servant relationship to the employee who receives workmen's compensation benefits; thus the state has a more stringent duty to him than it has to a mere citizen.¹²⁸ Additionally, compensation benefits for injury to the employee could be considered as an element of the employee's salary or wages and not a gift.¹²⁹ Payment of wages to employees of the state is apparently a public purpose.

While the *Tyler* decision has not been overruled, it has been weakened substantially by later decisions. On rehearing,¹³⁰ the majority reaffirmed its position but emphasized that several other reasons supported its holding. It is important to note that presiding Judge Powell changed his vote on the constitutional question on the ground that the expenditures were for the general public good and not violative of section 52.

Three years later, in *Southern Casualty Co. v. Morgan*,¹³¹ the Commission of Appeals (Section A) considered the identical problem posed in *Tyler*. The majority of the court in *Morgan* impliedly accepted the correctness of *Tyler* but held that the contract between the city and the insurance company (the method by which payment of compensation was effected), even though ultra vires, was not void. The court then went on to hold that the insurance company was estopped from asserting the bene-

¹²⁶ *Id.* "The legislature shall have no power to authorize any . . . political . . . subdivision . . . to become a stockholder in [a] corporation, association or company . . ."

¹²⁷ *City of Tyler v. Texas Employers' Ins. Ass'n*, 288 S.W. 409, 412 (Tex. Comm'n App. 1926).

¹²⁸ *Collins v. Pecos & N.T. Ry.*, 110 Tex. 577, 212 S.W. 477 (1919); *State v. Elliott*, 212 S.W. 695 (Tex. Civ. App. 1919), *error ref.*

¹²⁹ It has been held that a pension for city employees is not a gift, but part of the employee's compensation. *Byrd v. City of Dallas*, 118 Tex. 28, 6 S.W.2d 738 (1928). There is little difficulty in extending *Byrd* to group hospitalization and from there to workmen's compensation benefits.

¹³⁰ *City of Tyler v. Texas Employers' Ins. Ass'n*, 294 S.W. 195 (Tex. Comm'n App. 1927).

¹³¹ 12 S.W.2d 200 (Tex. Comm'n App. 1929).

fits of the contract.¹³² Thus, the decision allowed compensation to the city employees despite the fact that the court assumed that the act of providing such compensation was unconstitutional.

Two concurring judges expressly disagreed with the part of the *Tyler* decision which held that the legislature is without power to compensate state employees for their injuries while on the job. They believed that the policy of insurance became a part of the consideration for employment and was not, therefore, a gratuity. It was further stated by one of these judges that "there is absolutely no provision of the constitution which prohibits the legislature from altering or changing the common-law liability of cities and towns in cases of this character."¹³³

In *McCaleb v. Continental Casualty Co.*¹³⁴ the Supreme Court of Texas in 1938 finally was presented with the latent conflict between *Tyler* and *Morgan*. In that case the city of Corpus Christi contracted with the insurance company to provide compensation for injured city employees. It was understood that the contract was not under the authority of the Workmen's Compensation Act even though its benefits were measured by the standards of the Act. In an appeal from a suit by a city employee's wife to recover compensation under the contract for the death of her husband, the supreme court held that the insurance company was estopped to plead the illegality of the contract.¹³⁵ Thus, the *Morgan* reasoning was adopted. There was one important difference between the two cases, however. By the time of the *McCaleb* decision, section 59 of article III¹³⁶ had been added to the constitution, authorizing the legislature to enact laws to provide for workmen's compensation insurance for state employees. Consequently, the court in *McCaleb* did not have to meet the constitutional issue; rather it had to consider only whether the legislature, pursuant to the amendment, had authorized the city to provide such insurance. The purchase of compensation insurance without such authorization was only ultra vires and subject to the estoppel rule.

Because of subsequent decisions¹³⁷ and constitutional revisions,¹³⁸ the remnants of *Tyler* are of little aid in determining whether state assumption of tort liability by a general statute would serve a public purpose. *Tyler* presents one view—a divided one at that.

The other view is represented by *Graham v. Worthington*,¹³⁹ an Iowa supreme court case which found that the Iowa Tort Claims Act¹⁴⁰ was consistent with the state constitutional provision against giving public money to individuals. The court stated:

¹³² *Id.* at 201-02. The estoppel theory was based on the fact that the insurance company had accepted the premiums from the city and could not, therefore, later assert that the contract was illegal.

¹³³ *Id.* at 202.

¹³⁴ 132 Tex. 65, 116 S.W.2d 679 (1938).

¹³⁵ *Id.* at 683.

¹³⁶ TEX. CONST. art. III, § 59.

¹³⁷ *McCaleb v. Continental Casualty Co.*, 132 Tex. 65, 116 S.W.2d 679 (1938); *City of Tyler v. Texas Employers' Ins. Ass'n*, 294 S.W. 195 (Tex. Comm'n App. 1927) (rehearing); *Southern Cas. Co. v. Morgan*, 12 S.W.2d 200 (Tex. Comm'n App. 1929).

¹³⁸ TEX. CONST. art. III, §§ 59, 60, 61.

¹³⁹ *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (1966).

¹⁴⁰ IOWA CODE ANN. § 25A (1967).

The general purpose of [the Iowa Tort Claims Act] is to impose upon all the people of this state the burden, expense and cost which arise from tortious damage to property or injuries to persons by the officers, agents and employees of our state government. *This is a valid means of promoting the general welfare of the state. This is a public purpose.*¹⁴¹

It was implied that the general welfare was served by state recognition of "claims which rest upon such principles of right and equity as are fundamental to our jurisprudence, and which appeal to the public sense of justice as a moral obligation of the state."¹⁴²

Whether the Supreme Court of Texas would agree with the Iowa pronouncement is an open question. There is a paucity of Texas case law on the issue of what constitutes a public purpose. In addition, no specific definition of the phrase has ever been adopted by the Texas courts; on the contrary, such a determination has been dealt with on a case by case basis.¹⁴³

An indication of the supreme court's approach to the problem, however, is illustrated by *State v. City of Austin*.¹⁴⁴ The legislature had enacted a statute which provided reimbursement to utility companies for their expenses incurred in relocating facilities necessitated by highway improvement.¹⁴⁵ The statute was challenged on the ground that it violated the constitutional provisions against granting public money to individuals.¹⁴⁶ In upholding the statute, the court adopted an enlightened policy, noting that no net gain accrued to the utility companies because of the reimbursement. The only benefit was relief from financial burden which the state could require the company to bear. The court then isolated the ultimate question and provided a liberal answer:

The question to be decided then is whether the use of public funds to pay part or all of the loss or expense to which an individual or corporation is subjected by the state in the exercise of its police power is an unconstitutional donation for a private purpose. We think not, provided the statute creating the right of reimbursement operates prospectively, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious.¹⁴⁷

Application of this language to state assumption of tort liability appears to be warranted. As discussed above, general assumption of tort liability would be applied prospectively.¹⁴⁸ The public has a real and legitimate interest in such action since each member of the public is a potential victim of state torts and each member is a potential beneficiary of an act which would allow the state to assume liability for its torts. Likewise, general assumption of liability for prospective torts would not be fraudulent, arbitrary, or capricious since it would apply to everyone in the same manner.

There is one problem, however, in applying the *Austin* language to state assumption of liability for the torts of its officers, agents, and employees.

¹⁴¹ *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626, 636-37 (1966).

¹⁴² 146 N.W.2d at 636.

¹⁴³ *Ex parte Conger*, 163 Tex. 505, 357 S.W.2d 740 (1962).

¹⁴⁴ 160 Tex. 348, 331 S.W.2d 737 (1960).

¹⁴⁵ TEX. REV. CIV. STAT. ANN. art. 6674w-4 (1957).

¹⁴⁶ This was a declaratory judgment action instituted by the Attorney General of Texas.

¹⁴⁷ *State v. City of Austin*, 160 Tex. 348, 356, 331 S.W.2d 737, 743 (1960).

¹⁴⁸ See text accompanying notes 105-07 *supra*.

Austin clearly requires that the loss or expense, which is being reimbursed, be sustained as a result of the exercise of the state police power (*i.e.*, to serve a public purpose). The argument is sure to be made that the state has no power to act tortiously and that the state is powerless to authorize its employees to so act. Perhaps it is time to recognize that the state must rely on its employees and appointees to perform the acts necessary to achieve a police power objective or policy. The simple truth is that individuals do not always act in a reasonable fashion and that this trait in the human personality does not disappear upon association with the state. Assuming a negligent act is committed in the performance of a governmental function, the state should be able to consider compensation for the injuries caused by that act as an operating expense of achieving the governmental purpose. As the court emphasized in *Austin*, "[o]ur fundamental law does not contemplate or require that every private injury and loss which may be necessary to protect or promote the public health, safety, comfort and convenience must always be borne by individuals and corporations."¹⁴⁹

Assumption of liability for state torts in itself may be a valid exercise of the police power. Such assumption has as its overriding purpose the protection of the health, safety, and comfort of the public. Even though a few individuals ultimately will receive monetary benefits from a tort claims act, every person in the state will have the protection of such an act. Public purpose would appear to be served if every person in the state could feel safer and more comfortable in the thought that if injured by the state, he will be made whole again.

Summary. To some extent this discussion has been academic. It has been shown that there is weak logic and weak precedent favoring unconstitutionality of the assumption of tort liability by the state. Likewise, there are strong arguments, even if unsupported by Texas precedent, which support constitutionality. There is a non-academic factor, however, which tends to remove doubt as to constitutionality. Reference is made to the recently published article by Justice Greenhill of the Texas supreme court which called for immediate legislative action regarding the liability of the state for its torts.¹⁵⁰ It is significant that Justice Greenhill did not advocate a constitutional amendment for such purpose. It cannot be known how many other supreme court justices silently joined with Justice Greenhill in his plea, but it can be deduced that His Honor would not have attempted to stimulate legislative action in the face of a recalcitrant majority.

III. GOVERNMENTAL IMMUNITY IN THE STATES

In considering possible remedial measures, careful study should be given to the legislative and judicial experience of other states regarding governmental immunity. The most practical approach to such a study is to analyze the states on the basis of two categories: (1) those which have not

¹⁴⁹ *State v. City of Austin*, 160 Tex. 348, 357, 331 S.W.2d 737, 743 (1960).

¹⁵⁰ Greenhill, *supra* note 68.

altered substantially the rule of governmental immunity, and (2) those which have altered substantially the immunity doctrine. An examination of the states in which the general rule of immunity has not been altered substantially not only reveals the common tort immunity of these states but also the areas in which they have accepted limited liability in spite of the general rule of immunity. Conversely, an examination of the states which have either abrogated or substantially altered the doctrine of governmental immunity discloses common areas of liability as well as problem areas in which some of these states have preserved the immunity through legislative and judicial exceptions to the general rule of liability.

A. States Which Have Not Altered Substantially the Common Law Rule of Governmental Immunity

General Rule of Immunity. Approximately thirty states, including Texas, retain the basic common law rule providing immunity for the state and its political subdivisions. Of this number, Alabama, Arkansas, and West Virginia have constitutional provisions establishing governmental immunity,¹⁵¹ and the remainder appear to have adopted the doctrine by court decision. Within the states in which governmental entities are immune from tort liability, suits cannot be brought against the state or its political subdivisions unless legislative consent is given.¹⁵² In a few states, the established courts will hear suits once the state has given its consent to the suit. In other states, special courts and claims boards have been established to handle authorized suits against governmental entities. There are still a few jurisdictions in which the injured citizen can recover only after the enactment of a private bill on his behalf in the state legislature.

While actual statutory consent is required before the individual can bring suit in these jurisdictions which retain governmental immunity, some courts have indicated the possibility of recognizing constructive or implied consent. The primary area in which such constructive or implied consent has been discussed is the situation in which a governmental entity performs part of its function through agencies organized in corporate form which are protected by liability insurance. Although no court has decided a case on this basis, the legislatures of several states have acted by consenting to liability to the extent of insurance coverage.¹⁵³ It should be noted, however, that consent to sue is not necessarily a waiver of governmental immunity, nor does it always insure the party bringing suit that a

¹⁵¹ ALA. CONST. art. I, § 14; ARK. CONST. art. V, § 20; W. VA. CONST. art. VI, § 35.

¹⁵² In twenty-five of these states, municipalities are liable for injuries caused by the negligence of employees engaged in a proprietary function. The attempted distinction between governmental and proprietary functions has resulted in a hopeless morass of court decisions from which no useful standard can be derived. For example, in Alabama, county and city school boards are not strictly governmental agencies so they have no immunity. *Ex parte* Bd. of School Comm'rs, 230 Ala. 304, 161 So. 108 (1935). However, the cutting of weeds along a public highway is a governmental function protected by governmental immunity. *Hillis v. City of Huntsville*, 274 Ala. 663, 151 So. 2d 240 (1963).

¹⁵³ IDAHO CODE ANN. § 41-3505 (1961); KAN. STAT. ANN. § 12-2603 (1964); MONT. REV. CODES ANN. § 83-701 (1966); N.H. REV. STAT. ANN. § 412:3 (1968); N.M. STAT. ANN. §§ 5-6-18 to 5-6-22 (Supp. 1966); N.D. CENT. CODE § 39-01-08 (Supp. 1967); OKLA. STAT. tit. 47, §§ 157.1-158.2 (Supp. 1968); PA. STAT. ANN. tit. 71, § 634 (1962).

judgment will be satisfied. It necessarily follows that if the citizen is to be compensated for damages caused by the tortious conduct of the state or one of its political subdivisions there must be consent to bring suit and consent to pay the claim if the injured party is to be successful.

Exceptions Providing for Liability. In the states which have retained the common law doctrine of governmental immunity, there are four significant areas indicating the development of a trend for the state to give consent to suit and to provide for payment of successful claims. These areas include the acceptance of liability for (1) defective highways, roads, and bridges, (2) defective public buildings, (3) negligent operation of a government vehicle by an employee while in the scope of his employment, and (4) damages, to the extent of liability insurance coverage, caused by the tortious conduct of a governmental entity.

Acceptance of Liability for Defective Highways, Roads, and Bridges. Kansas, Massachusetts, Michigan, New Hampshire, South Carolina, and Tennessee acknowledge liability for defective highways, roads, and bridges if the state had adequate notice of the defect.¹⁵⁴ In these six states there is generally an explicit waiver by the state of governmental immunity for injuries caused by such defects, and the injured party is given permission to sue in a court of competent jurisdiction. However, the plaintiff must first file a claim with the official agency which has responsibility for the highway, road, or bridge and only when compensation is denied by that agency can an action be brought. In contrast to these six states which have accepted liability for defective highways, roads, and bridges, nine states have made counties liable by statute¹⁵⁵ and fourteen have imposed liability on municipalities by statute or court decision in this same area.¹⁵⁶ In the jurisdictions in which the county or municipality is made liable for defective highways, roads, and bridges, a claim must first be filed with the responsible governing unit, and if the claim is denied, suit can be brought against the county or municipality. With regard to the liability of the state, county, or municipality for defective roadways, a common prerequisite exists that the governing body must have actual or constructive notice of the defect before it can be charged with liability.

Acceptance of Liability for Defective Public Buildings. Michigan and

¹⁵⁴ KAN. STAT. ANN. § 68-419 (1964); MASS. GEN. LAWS ANN. ch. 81, § 18 (1964); MICH. COMP. LAWS ANN. §§ 691.1402, 691.1403 (1968); N.H. REV. STAT. ANN. § 247:17 (1964); S.C. CODE ANN. § 33-229 (1962); TENN. CODE ANN. § 9-812 (Supp. 1968); TENN. CODE ANN. §§ 9-801 to -814 (1956).

¹⁵⁵ GA. CODE ANN. § 95-1001 (1958); KAN. STAT. ANN. § 68-301 (1964); MASS. GEN. LAWS ANN. ch. 84, § 15 (1967); MICH. COMP. LAWS ANN. § 691.1402 (1968); NEB. REV. STAT. §§ 14-801, 39-809 (1943); N.H. REV. STAT. ANN. § 247:17 (1964); OHIO REV. CODE ANN. § 305.12 (Page 1953); S.D. CODE § 28.0913 (Supp. 1960); W. VA. CODE ANN. § 17-10-17 (1966).

¹⁵⁶ Carlisle v. Parish of East Baton Rouge, 114 So. 2d 62 (La. App. 1959); Weisner v. Mayor & Council of Rockville, 225 A.2d 648 (Md. Ct. App. 1967); ALA. CODE tit. 37, § 502 (1958); KAN. STAT. ANN. § 68-301 (1964); ME. REV. STAT. ANN. tit. 23, § 3655 (1965); MASS. GEN. LAWS ANN. ch. 84, § 15 (1967); MICH. COMP. LAWS ANN. §§ 691.1402, 691.1403 (1968); NEB. REV. STAT. §§ 14-801, 39-809 (1968); N.H. REV. STAT. ANN. § 247:17 (1964); N.D. CENT. CODE §§ 40-42-01 to 40-42-05 (1968); OHIO REV. CODE ANN. tit. 7, § 723.01 (Page 1954); S.C. CODE ANN. § 47-70 (1962); S.D. CODE § 28.0913 (Supp. 1960); W. VA. CODE ANN. § 17-10-17 (1966).

Tennessee have accepted liability for injuries caused by defects in state buildings and have imposed similar liability on the counties of the state.¹⁵⁷ Michigan also extends this liability to the municipality for such defects. On the other hand, Alabama imposes liability on the municipality without making the state or county branches of government liable for injuries caused by similar defects.¹⁵⁸ In these jurisdictions, the liability of the respective governmental body depends upon its having notice of the defect. There is no liability for latent defects; liability arises only when the governmental unit had actual or constructive notice of the defect.

Acceptance of Liability for the Negligent Operation of a Government Vehicle. The third area in which there appears to be a trend toward the acceptance of tort liability in spite of the general rule of governmental immunity involves the negligent operation of a government vehicle by an employee while acting in the scope of his employment. The legislatures of Colorado, Michigan, and South Carolina have enacted legislation which extends liability to the state and all of its political subdivisions for injuries and damages caused by the negligent operation of government vehicles by government employees.¹⁵⁹ Tennessee has a similar statute relegating liability to the state level only; its county and municipal branches of government remain free from liability.¹⁶⁰ Conversely, Pennsylvania has imposed liability on counties and municipalities for negligent operation of motor vehicles by government employees while the state remains free from similar liability.¹⁶¹ Ohio also has become part of this trend, but liability in that state is limited to the municipality.¹⁶² The most recent development in this area came in 1968 when the Supreme Court of Nebraska held that in spite of the general rule of governmental immunity, all cities and other governmental subdivisions and local public bodies of the state would no longer be immune from tort liability arising from the ownership, use, and operation of motor vehicles.¹⁶³

Acceptance of Liability to the Extent of Insurance Coverage. In the states which retain the common law rule of governmental immunity, the most significant exception which has developed is the acceptance by the governmental unit of liability, to the extent of insurance coverage, for damages and injuries caused by the tortious conduct of its employees. Of the thirty jurisdictions which remain generally immune from tort liability, the legislatures of nine states have authorized state agencies to purchase liability insurance.¹⁶⁴ In eleven states, counties have similar authorization.¹⁶⁵

¹⁵⁷ MICH. COMP. LAWS § 691.1406 (1968); TENN. CODE ANN. § 9-812 (Supp. 1968).

¹⁵⁸ ALA. CODE tit. 37, § 502 (1959).

¹⁵⁹ COLO. REV. STAT. ANN. § 13-10-1 (1964); MICH. COMP. LAWS § 691.1405 (1968); S.C. CODE ANN. § 33-229 (1962).

¹⁶⁰ TENN. CODE ANN. § 9-812 (Supp. 1968).

¹⁶¹ PA. STAT. ANN. tit. 75, § 623 (1960).

¹⁶² OHIO REV. CODE ANN. § 701.02 (Page 1954).

¹⁶³ BROWN v. City of Omaha, 160 N.W.2d 805, 809 (Neb. 1968).

¹⁶⁴ IDAHO CODE ANN. § 41-3505 (1961); KAN. STAT. ANN. § 12-2602 (1964); MONT. REV. CODES ANN. § 83-701 (1966); N.H. REV. STAT. ANN. § 412:3 (1968); N.M. STAT. ANN. § 5-6-18 (Supp. 1966); N.D. CENT. CODE § 39-01-08 (Supp. 1967); OKLA. STAT. tit. 47, §§ 157.1-158.1 (Supp. 1968); PA. STAT. ANN. tit. 71, § 634 (1962).

¹⁶⁵ BROWN v. City of Omaha, 160 N.W.2d 805 (Neb. 1968); GA. CODE ANN. § 56-2437 (1960); IDAHO CODE ANN. § 41-3505 (1961); KAN. STAT. ANN. § 12-2601 (1964); N.H.

An additional eleven states authorize the purchase of liability insurance by municipalities.¹⁶⁶ Even though the purchase of liability insurance generally is not mandatory, the purchase of such insurance, where authorized, is apparently the practice rather than the exception. Typically, the purchase of liability insurance constitutes a waiver of governmental immunity to the extent of insurance coverage; thus judgments in excess of policy limits are generally of no force and effect.¹⁶⁷

Presentation of Claims. In the states which retain common law immunity and which have statutorily or judicially accepted liability in one or more of the areas discussed above, a pattern for processing claims against the state and its political subdivisions has developed. Generally, the states have established an administrative procedure in which a court of claims or a board of adjustment is set up for the express purpose of hearing claims against the state.¹⁶⁸ The statutes which create these courts and boards generally authorize the court or board to hear claims which the state in good faith and conscience should pay. Often the claim must first be denied by the responsible state agency before an action can be commenced. The weight accorded this administrative hearing varies. In a few states the court or board can directly authorize payment; however, in most jurisdictions, the findings of the court or board are only recommendatory in nature. Thus, upon receiving these recommendations, the state legislature must pass a special bill to authorize payment of the claim.

B. States Which Have Altered Substantially the Common Law Rule of Governmental Immunity

General Rule of Liability. In the remaining twenty states, the doctrine of governmental immunity has been altered substantially; however, the degree of alteration varies from state to state. Alaska, Arizona, Hawaii, Iowa, Nevada, New York, Oregon, and Washington have abrogated the immunity with respect to both the state and its political subdivisions.¹⁶⁹

REV. STAT. ANN. § 412:3 (1968); N.M. STAT. ANN. § 5-6-18 (Supp. 1966); N.D. CENT. CODE § 39-01-08 (Supp. 1967); OHIO REV. CODE ANN. § 307.44 (Page 1953); OKLA. STAT. tit. 11, § 16.1 (1959); PA. STAT. ANN. tit. 53, § 65713 (1957); W. VA. CODE ANN. § 804-10(f) (1966).

¹⁶⁶ GA. CODE ANN. § 56-2437 (1960); IDAHO CODE ANN. § 41-3505 (1961); KAN. STAT. ANN. § 12-2601 (1964); N.H. REV. STAT. ANN. § 412:3 (1968); N.M. STAT. ANN. § 5-6-18 (Supp. 1966); N.D. CENT. CODE § 39-01-08 (Supp. 1967); OKLA. STAT. tit. 11, § 16.1 (1959); PA. STAT. ANN. tit. 16, § 2303 (1956); W. VA. CODE ANN. § 8-4-10(f) (1966); WYO. STAT. ANN. § 15.1-4 (1965).

¹⁶⁷ See statutes cited note 164 *supra*.

¹⁶⁸ ALA. CODE tit. 55, §§ 333, 334 (1960); COLO. REV. STAT. ANN. § 130-10-4 (Supp. 1965); CONN. GEN. STAT. REV. §§ 4-141 to -165 (1958); GA. CODE ANN. § 47-504 (1965); MASS. GEN. LAWS ANN. ch. 12, §§ 3A-D (1966); MICH. STAT. ANN. §§ 27A.6401-.6475 (1962); OHIO REV. CODE ANN. § 127.11 (Page Supp. 1967); R.I. GEN. LAWS ANN. §§ 22-7.1-1 to 22-7.1-7 (1968); S.D. CODE §§ 33.4301-.4308 (Supp. 1960); TENN. CODE ANN. §§ 9-801 to -815 (1955); W. VA. CODE ANN. § 14-2-12 (Supp. 1968).

¹⁶⁹ *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963); ALASKA STAT. §§ 09.50.250, 09.65.70 (1962); HAWAII REV. LAWS § 245A-2 (Supp. 1965) (*Carter v. County of Hawaii*, 47 Hawaii 68, 384 P.2d 308 (1963), extended liability to the political subdivisions of the state); IOWA CODE § 25A.4 (1967) (*Lindstrom v. Mason City*, 256 Iowa 83, 126 N.W.2d 292 (1964), extended liability to the local branches of government); NEV. REV. STAT. § 41-031 (1967); N.Y. CT. CL. ACT § 8 (McKinney 1963) (*Spiegler v. School Dist. of City of New Rochelle*, 39 Misc. 2d 720, 241 N.Y.S.2d 967 (Sup. Ct.), *aff'd*, 19 App. Div. 2d 623, 243 N.Y.S.2d 74 (1963), waived immunity of all political subdivisions); ORE. REV. STAT. § 30.265(1) (1968); WASH. REV. CODE ANN. §§ 4.92.090, 4.96.010 (Supp. 1968).

Arkansas, Florida, Indiana, Kentucky, and Minnesota have abrogated the doctrine at the municipal level, but the immunity of the state has been preserved to a great extent.¹⁷⁰ Vermont has abrogated the immunity at the state level without making significant changes in the rule as applied to its political subdivisions.¹⁷¹ California, Illinois, New Jersey, North Carolina, Utah, and Wisconsin have made substantial changes in the immunity doctrine without abrogating the rule with regard to any political entity of the state.¹⁷²

Abrogation of the Immunity at the State and Municipal Levels. In the jurisdictions where governmental immunity has been abrogated, the courts have been almost as active as the legislatures in accomplishing this abrogation. Of the eight states which have abrogated the immunity of the state and its political subdivisions, only Alaska, Nevada, Oregon, and Washington have done so solely through legislative enactment.¹⁷³ Typically, the statutes of these four states waive the immunity of the state and its political subdivisions and provide that the state consents to have its liability determined in accordance with the same rules of law as applied in civil actions against individuals and corporations.

Similar statutes are in effect in Hawaii, Iowa, and New York, but the statutes of these three states do not expressly extend liability to the political subdivisions of the state.¹⁷⁴ However, in these three jurisdictions, the courts have extended tort liability to the political subdivisions of the state on the ground that the immunity of a political subdivision exists only because of its status as a branch of the sovereign or state.¹⁷⁵ Thus, when the state waives its immunity, the immunity of the political subdivision is waived to the same extent.

In 1963, Arizona by court decision abrogated the immunity of the state and its political subdivisions.¹⁷⁶ The state supreme court thoroughly examined the rule of governmental immunity and concluded that it should be discarded. In this regard, the court stated:

It requires but a slight appreciation of the facts to realize that if the individual citizen is left to bear almost all the risk of a defective, negligent, perverse or erroneous administration of the state's functions, an unjust

¹⁷⁰ *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Klepinger v. Board of Comm'rs*, 239 N.E.2d 160 (Ind. Ct. App. 1968); *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964); MINN. STAT. ANN. §§ 466.01-17 (1963).

¹⁷¹ VT. STAT. ANN. tit. 12, § 5601 (Supp. 1968).

¹⁷² *Hoy v. Capelli*, 48 N.J. 81, 222 A.2d 649 (1966); CAL. GOV'T CODE § 810-006.6 (West 1966); ILL. ANN. STAT. ch. 37, § 439.1 (Smith-Hurd 1967); ILL. ANN. STAT. ch. 85, §§ 1-101 to 10-101 (Smith-Hurd 1966); N.C. GEN. STAT. § 143-291 (Supp. 1967); N.C. GEN. STAT. §§ 160-191.1, 160-191.4 (Supp. 1967); UTAH CODE ANN. §§ 63-30-3, 63-30-34 (1968); WIS. STAT. ANN. § 895.43 (1966).

¹⁷³ ALASKA STAT. §§ 09.50.250, 09.65.070 (1962); NEV. REV. STAT. § 41.031 (1967); ORE. REV. STAT. § 30.265(1) (1967); WASH. REV. CODE ANN. § 4.92.090 (1963); WASH. REV. CODE ANN. § 4.96-019 (1968).

¹⁷⁴ HAWAII REV. LAWS § 245A-2 (Supp. 1965); IOWA CODE § 25A.4 (1967); N.Y. CT. CL. ACT § 8 (McKinney 1963).

¹⁷⁵ *Carter v. County of Hawaii*, 47 Hawaii 68, 384 P.2d 308 (1963); *Lindstrom v. Mason City*, 256 Iowa 83, 126 N.W.2d 292 (1964); *Spiegler v. School Dist. of City of New Rochelle*, 39 Misc. 2d 720, 241 N.Y.S.2d 967 (Sup. Ct.), *aff'd*, 19 App. Div. 2d 751, 243 N.Y.S.2d 74 (1963).

¹⁷⁶ *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963).

burden will become graver and more frequent as the government's activities are expanded and become more diversified.¹⁷⁷

Thus, in Alaska, Arizona, Hawaii, Iowa, Nevada, New York, Oregon, and Washington, as the activities of the state have expanded, giving rise to the inevitable increase in injuries caused by the tortious conduct of governmental employees, liability has been accepted by the state and its political subdivisions.

Abrogation of Immunity at the Municipal Level Only. Arkansas, Florida, Indiana, Kentucky, and Minnesota also have been a part of the trend toward placing greater risk and burden on the political entity for its tortious conduct. However, in these five states governmental immunity has been abrogated only with regard to municipalities; the state itself remains generally immune from tort liability. In Minnesota, liability has been imposed on municipalities by statute.¹⁷⁸ However, in Arkansas, Florida, Indiana, and Kentucky, such liability has been imposed upon the municipal branches of government by the courts.¹⁷⁹

Florida became the first of these states to abolish municipal immunity through court decision when in 1957 its supreme court held that an action could be maintained by a widow against a city for the wrongful death of her husband who died of smoke suffocation after being locked in a jail which was left unattended. The court rejected the idea that it is better for an individual to suffer grievous wrong than to impose liability on the people vicariously through their government. In abandoning immunity as applied to the municipality, the court stated that "when an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done."¹⁸⁰ In 1967 the Supreme Court of Florida, in an explanation of its 1957 decision, equated the liability of a municipal corporation to that of a private corporation.¹⁸¹

The highest court of Kentucky abolished the immunity of the municipality in a case involving the death of a child in a swimming pool operated by the city.¹⁸² In 1968 the courts of Indiana¹⁸³ and Arkansas¹⁸⁴ also abolished the tort immunity of the municipality. The courts of these three states reasoned that the doctrine can no longer be justified as a rule of law because it unjustly places the burden for torts committed by political entities on the individual citizens who suffer the injuries.

Abrogation of Immunity at the State Level Only. Although the general trend appears to be to impose greater liability on the municipality than

¹⁷⁷ 381 P.2d at 109.

¹⁷⁸ MINN. STAT. ANN. §§ 466.01-.17 (1967).

¹⁷⁹ *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Klepinger v. Board of Comm'rs*, 239 N.E.2d 160 (Ind. Ct. App. 1968); *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964).

¹⁸⁰ *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133-34 (Fla. 1957).

¹⁸¹ *Modlin v. City of Miami Beach*, 201 So. 2d 70, 73 (Fla. 1967).

¹⁸² *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964).

¹⁸³ *Klepinger v. Board of Comm'rs*, 239 N.E.2d 160 (Ind. Ct. App. 1968).

¹⁸⁴ *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968).

on the state, Vermont is the exception, having a statute which provides that the state shall be liable for its torts to the same extent as a private person.¹⁸⁵ However, liability is not placed upon municipalities by this statute, and the courts of that state have not yet acted to extend the liability.

Substantial Change in the Doctrine of Governmental Immunity Without Abrogating the Doctrine at Any Level of Government. In contrast to the fourteen states which have abrogated the immunity at either or both the state and municipal levels, California, Illinois, New Jersey, North Carolina, Utah, and Wisconsin have brought about substantial change in the immunity without abrogating it as applied to any governmental entity. New Jersey and Wisconsin have experienced significant change in the immunity as a result of court decision. The Supreme Court of New Jersey has held that municipalities are liable for active wrongdoing or damages and injuries caused by negligent acts of commission as distinguished from negligent failure to act.¹⁸⁶ Although this decision falls short of abrogating the immunity doctrine, it creates a substantial exception to the immunity by imposing liability in cases of active negligence. The Supreme Court of Wisconsin also has made a substantial change in the doctrine by holding that state immunity from tort liability is abolished subject to the requirement of the Wisconsin Constitution that the legislature shall direct the manner in which the state shall be sued.¹⁸⁷ This limitation is not a significant handicap because the legislature has given substantial consent to be sued.¹⁸⁸

Without abrogating the immunity of any political entity, the legislatures of California, Illinois, North Carolina, and Utah have brought about substantial change in the immunity doctrine through statutory schemes typically providing that the state is immune from suit unless otherwise provided by legislative act.¹⁸⁹ Since these states have enacted a significant number of legislative exceptions to the immunity doctrine, the result is governmental acceptance of liability in the areas in which most injuries occur and in which the public has the greatest need for protection. Even though these states by legislation have waived tort immunity in many areas, the most significant is the waiver of immunity and acceptance of liability for injury proximately caused by the negligent act or omission of a government employee committed within the scope of his employment.

Exceptions Providing for Immunity. Even within those states which have taken substantial action toward providing a means of redress for torts inflicted by the agents of the state and its political subdivisions, a considerable number of exceptions have developed as a result of legislative

¹⁸⁵ VT. STAT. ANN. tit. 12, § 5601 (Supp. 1968).

¹⁸⁶ Hoy v. Capelli, 48 N.J. 81, 222 A.2d 649 (1966).

¹⁸⁷ Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

¹⁸⁸ WIS. STAT. ANN. § 895.43 (1966).

¹⁸⁹ CAL. GOV'T CODE §§ 810-996.6 (West 1966); ILL. ANN. STAT. ch. 37, §§ 439.1-24 (Smith-Hurd 1967); ILL. ANN. STAT. ch. 85, §§ 1-101 to 10-101 (Smith-Hurd 1966); N.C. GEN. STAT. § 143-291 (Supp. 1967); N.C. GEN. STAT. §§ 160-191.1, 160-191.4 (Supp. 1967); UTAH CODE ANN. §§ 63-30-3, 63-30-34 (1968).

and judicial action. A general statutory waiver of governmental immunity does not prevent the creation of exceptions to the general rule of liability because the statutory waivers generally provide that the immunity of the state from suit is waived, except as otherwise provided by statute. In this manner legislatures which have waived immunity have retained an effective means of creating exceptions to the general rule of liability. In jurisdictions in which the courts have acted to abrogate the doctrine of immunity, either the courts or the legislatures have found it necessary to create exceptions which effectively preserve the immunity in certain areas. The areas in which immunity has been preserved generally are recognized as problem areas, and a number of jurisdictions indicate that in these specific areas, a political entity should not be required to accept liability. Thus, it is apparent that no state has accepted complete liability for its tortious conduct.

Legislative action has resulted in the development of six widely adopted exceptions to the general rule of liability in the twenty jurisdictions which have accepted substantial tort liability. The six exceptions may be classified as (1) intentional torts, (2) discretionary functions, (3) execution of a statute, (4) quarantine, (5) punitive damages, and (6) inspections.

Intentional Tort Exception. Alaska, Hawaii, Illinois, California, Iowa, Utah, Vermont, and Wisconsin have adopted the intentional tort exception to liability.¹⁰⁰ The statutes of these states vary, and while the major emphasis appears to be a denial of liability for damages caused by misrepresentation of a governmental employee, most of the statutes are of a more general nature. Typically, these statutes provide that there is no liability on the state or its political subdivisions for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Thus these statutes apparently are designed not only to prevent recovery when the claim arises from an intentional tort committed by a government employee, but also to prevent recovery when specific governmental functions (*e.g.*, prosecution, service of process) are intentionally or negligently misused.

Discretionary Function Exception. Alaska, Arkansas, California, Hawaii, Illinois, Iowa, Minnesota, Nevada, Oregon, Utah, Vermont, and Washington have preserved an exception in the area of discretionary functions.¹⁰¹ The major purpose of this exception is to protect political entities

¹⁰⁰ ALASKA STAT. § 09.50.250(3) (1966); CAL. GOV'T CODE § 818.8 (West 1966) (misrepresentations of employee); CAL. GOV'T CODE § 822.2 (West 1966); HAWAII REV. LAWS § 245A-15(d) (Supp. 1965); ILL. ANN. STAT. ch. 85, § 2-107 (Smith-Hurd 1966) (libel and slander of employee of local public entity); ILL. ANN. STAT. ch. 85, § 2-106 (Smith-Hurd 1966) (misrepresentation of employee of local public entity); ILL. ANN. STAT. ch. 85, § 2-210 (Smith-Hurd 1966) (negligent misrepresentation of public employees); IOWA CODE ANN. § 25A.14 (1967); UTAH CODE ANN. § 63-30-10(2) (1968); UTAH CODE ANN. § 63-30-10(6) (1968) (misrepresentation); VT. STAT. ANN. tit. 12, § 5602(6) (Supp. 1968); WIS. STAT. ANN. § 895.43(3) (1966).

¹⁰¹ *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45, 53 (1968) (although this case abrogated governmental immunity for the municipality the decision preserved this exception); *Barnum v. State*, 435 P.2d 678 (Wash. 1967); ALASKA STAT. § 09.50.250(1) (1962); CAL. GOV'T CODE § 820.2 (West 1966); HAWAII REV. LAWS § 245A-15(a) (Supp. 1965); ILL. ANN. STAT. ch. 85, § 2-201 (Smith-Hurd 1966); IOWA CODE ANN. § 25A.14(1) (1967); MINN. STAT. ANN.

from liability while acting or failing to act in a discretionary matter. For instance, there would be no liability for locating or failing to locate a particular facility at a particular location, for building or failing to build a highway on a particular route, or for prosecuting or failing to prosecute an individual charged with a crime. In the jurisdictions which have adopted this exception, the statutes and the courts have stated that there shall be no liability for a claim based upon the exercise of, or the failure to exercise, a discretionary function on the part of a state agency, employee, or political subdivision, whether or not the discretion is abused.

Execution of Statute Exception. Alaska, Hawaii, Illinois, California, Iowa, Minnesota, Nevada, Oregon, and Vermont have enacted an exception denying liability when the injury or damage which is the basis of the claim occurs during the execution of a statute or regulation by a government employee.¹⁹² The wordings of the statutes creating this exception are such that the exception has little significance because these statutes usually provide that there shall be no liability for an act or omission of a government employee *exercising due care* in the execution of a statute or regulation, regardless of whether such statute or regulation is valid. Thus limiting this exception to a denial of liability only when the employee exercises due care in the execution of the statute or regulation makes recovery possible when the employee acts negligently in such execution.

Quarantine Exception. A fourth exception which appears to be gaining acceptance involves quarantines imposed by the state. Alaska, California, Illinois, Iowa, and Vermont have enacted statutes providing that there shall be no liability for any claim based on damages caused by the imposition or establishment of a quarantine by the state for the prevention or control of communicable disease.¹⁹³

Punitive Damage Exception. Although the punitive damage exception is a limitation on the amount of damages rather than a refusal to accept liability, it has gained wide acceptance in recent years. California, Hawaii, Illinois, Minnesota, Nevada, Utah, and Wisconsin have enacted legislation which prevents the recovery of punitive damages in any action against the state or any local unit of government.¹⁹⁴

Inspection Exception. Another exception which has gained some acceptance involves inspections. California, Illinois, Nevada, and Utah have enacted legislation which generally provides that there shall be no liability

§ 466.03(6) (1967); NEV. REV. STAT. § 41.032(2) (1967); ORE. REV. STAT. § 30.265(2)(e) (1967); UTAH CODE ANN. § 63-30-10(1) (1968); VT. STAT. ANN. tit. 12, § 5602(1) (Supp. 1968).

¹⁹² ALASKA STAT. § 09.50.250(1) (1962); CAL. GOV'T CODE §§ 820.4, 820.6 (West 1966); HAWAII REV. LAWS § 245A-15(a) (Supp. 1965); ILL. ANN. STAT. ch. 85, §§ 2-202, 2-203 (Smith-Hurd 1966); IOWA CODE ANN. § 25A.14(1) (1967); MINN. STAT. ANN. § 466.03(5) (1967); NEV. REV. STAT. § 41.032(1) (1967); ORE. REV. STAT. § 30.265(2)(d) (1967); VT. STAT. ANN. tit. 12, § 5602(1) (Supp. 1968).

¹⁹³ ALASKA STAT. § 09.50.250(2) (1962); CAL. GOV'T CODE § 855.4 (West 1966); ILL. ANN. STAT. ch. 85, § 6-104 (Smith-Hurd 1966); IOWA CODE ANN. § 25A.14(3) (1967); VT. STAT. ANN. tit. 12, § 5602(3) (Supp. 1968).

¹⁹⁴ CAL. GOV'T CODE § 818 (West 1966); HAWAII REV. LAWS § 245A-2 (Supp. 1965); ILL. ANN. STAT. ch. 85, § 2-102 (Smith-Hurd 1966); MINN. STAT. ANN. § 466.04(1) (1967); NEV. REV. STAT. § 41-035(1) (1967); UTAH CODE ANN. § 63-30-22 (1968); WIS. STAT. ANN. § 895.43(2) (1966).

for injuries caused by failure to make an inspection or by reason of making an inadequate or negligent inspection of any property, other than its own, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.¹⁹⁵

Governmental Function Exception, Created by the Courts. The only exception which has been created widely by the courts is the governmental function exception granting immunity to the governmental entity when acting strictly in a governmental capacity.¹⁹⁶ Generally, this exception preserves immunity for any act which is unique to governments and which cannot be carried on by individuals or corporations. Legislative or judicial actions are typical examples. However, this exception has been extended by court decision to include anything which may be classified as quasi-legislative or quasi-judicial.

Other Exceptions. Seventeen other exceptions are worthy of brief consideration since they have been enacted into legislation in one or more of the twenty jurisdictions which have accepted liability in a number of areas. These exceptions include:

(1) *Licenses*—No liability for damages or injuries caused by the issuance, denial, suspension or revocation of, by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the entity or its employees are authorized by legislative enactment to determine whether or not such authorization should be issued, denied, suspended, or revoked.¹⁹⁷

(2) *Legislation*—No liability for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any existing legislation.¹⁹⁸

(3) *Recreational Areas*—No liability for injuries caused by the use of public property as parks, playgrounds, or recreational areas in the absence of willful and wanton negligence on the part of the state or its subdivisions.¹⁹⁹

(4) *Escaping Prisoner*—No liability for injury or damage inflicted by an escaping or escaped prisoner.²⁰⁰

(5) *National Guard*—No liability for claims arising out of combatant activities of the national or state guard.²⁰¹

¹⁹⁵ CAL. GOV'T CODE §§ 818.6, 821.4 (West 1966); ILL. ANN. STAT. ch. 85, §§ 2-105, 2-207 (Smith-Hurd 1966); NEV. REV. STAT. § 41.033(1) (1967); UTAH CODE ANN. § 63-30-10(4) (1968).

¹⁹⁶ *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45, 53 (1968); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133 (Fla. 1957); *Granger v. State*, 14 App. Div. 2d 645, 218 N.Y.S.2d 742 (1961); *Creelman v. Swennings*, 67 Wash. 2d 882, 410 P.2d 606 (1966); *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965); CAL. GOV'T CODE § 821.6 (West 1966); WIS. STAT. ANN. § 895.43(3) (1966).

¹⁹⁷ *Granger v. State*, 14 App. Div. 2d 645, 218 N.Y.S.2d 742 (1961); CAL. GOV'T CODE § 818.4 (West 1966); ILL. ANN. STAT. ch. 85, §§ 2-104, 2-206 (Smith-Hurd 1966); UTAH CODE ANN. § 63-30-10(3) (1968).

¹⁹⁸ CAL. GOV'T CODE §§ 818.2, 821 (West 1966); ILL. ANN. STAT. ch. 85, §§ 2-103, 2-205 (Smith-Hurd 1966).

¹⁹⁹ CAL. GOV'T CODE § 831.2 (West 1966); ILL. ANN. STAT. ch. 85, § 3-106 (Smith-Hurd 1966); UTAH CODE ANN. § 63-30-10(11) (1968).

²⁰⁰ CAL. GOV'T CODE §§ 844.6, 845.8 (West 1966); ILL. ANN. STAT. ch. 85, § 4-106(b) (Smith-Hurd 1966); UTAH CODE ANN. § 63-30-10(10) (1968).

²⁰¹ HAWAII REV. LAWS § 245A-15(e) (Supp. 1965); UTAH CODE ANN. § 63-30-10(9) (1968); VT. STAT. ANN. tit. 12, § 5602(5) (1968).

(6) *Weather Conditions on Roadways*—No liability for injuries caused by the effects of weather conditions on streets, highways, alleys, sidewalks, or other public places.²⁰²

(7) *Entry Upon Property*—No liability for damages or injury caused by entry upon property by a government employee when such entry is expressly or impliedly authorized by law.²⁰³

(8) *Maintenance of Public Property*—No liability for the care, maintenance, or design of public property.²⁰⁴

(9) *Traffic Signals*—No liability for initially failing to provide traffic warning signals and signs.²⁰⁵

(10) *Fire Department*—No liability for failing to provide a fire department or for otherwise failing to provide fire protection or to suppress or contain fires.²⁰⁶

(11) *School Safety Patrol*—No liability for claims arising from the organization, operation, or maintenance of a school safety patrol.²⁰⁷

(12) *Civil Defense*—No liability for personal injury or property damage sustained by any person acting as a volunteer civilian defense worker. No liability for damages and injuries caused by civil defense workers in the absence of willful misconduct, gross negligence, or bad faith.²⁰⁸

(13) *Police Service*—No liability for failing to establish a police department or otherwise failing to provide police protection service, or, if police protection service is provided, no liability for failing to provide adequate police protection service.²⁰⁹

(14) *Death Actions*—In the case of death caused by the tortious conduct of the state, liability shall be limited to actual or compensatory damages.²¹⁰

(15) *Riots*—No liability for injury or claims arising out of or resulting from riots, unlawful assemblies, public demonstrations, mob violence, or civil disturbance.²¹¹

(16) *Emergency Vehicles*—No liability for injuries arising out of a collision or accident involving emergency vehicles of the state.²¹²

(17) *Latent Defects*—No liability for injuries caused by latent defects in public buildings.²¹³

Although all of the exceptions listed and discussed are not extremely

²⁰² CAL. GOV'T CODE § 831 (West 1966); ILL. ANN. STAT. ch. 85, § 3-105 (Smith-Hurd 1966); MINN. STAT. ANN. § 466.03(4) (1967).

²⁰³ CAL. GOV'T CODE § 821.8 (West 1966); ILL. ANN. STAT. ch. 85, § 2-209 (Smith-Hurd 1966).

²⁰⁴ CAL. GOV'T CODE § 830.6 (West 1966); ILL. ANN. STAT. ch. 85, § 3-102 (Smith-Hurd 1966).

²⁰⁵ CAL. GOV'T CODE §§ 830.4, 830.8 (West 1966); ILL. ANN. STAT. ch. 85, § 3-104 (Smith-Hurd 1966).

²⁰⁶ King v. City of New York, 3 Misc. 2d 241, 152 N.Y.S.2d 110 (Sup. Ct. 1956); CAL. GOV'T CODE §§ 850, 850.2 (West 1966); ILL. ANN. STAT. ch. 85, §§ 5-101, 5-102 (Smith-Hurd 1966).

²⁰⁷ ILL. ANN. STAT. ch. 85, § 2-211 (Smith-Hurd 1966).

²⁰⁸ ALASKA STAT. § 26.20.140 (1962).

²⁰⁹ King v. City of New York, 3 Misc. 2d 241, 152 N.Y.S.2d 110 (Sup. Ct. 1956); CAL. GOV'T CODE § 845 (West 1966); ILL. ANN. STAT. ch. 85, § 4-102 (Smith-Hurd 1966).

²¹⁰ HAWAII REV. LAWS § 245A-2 (Supp. 1965).

²¹¹ UTAH CODE ANN. § 63-30-10(7) (1968).

²¹² Id. § 63-30-7.

²¹³ Id. § 63-30-9.

significant, they at least form a reference point and indicate areas that should be considered in any legislative plan containing a waiver of state immunity.

Summary. While governmental immunity remains solidly entrenched in some thirty jurisdictions, the development of exceptions in these states reveals the general trend away from the strict concept of governmental immunity. The areas in which liability has been accepted within these states, however, are not as significant as might appear. More of these jurisdictions have accepted liability for injuries caused by defects in highways, roads, and bridges than in any other area. However, one might well question the percentage of total injuries caused by such defects. The negligent operation of government vehicles and defects in public buildings appear to constitute a greater threat to public safety; yet fewer states have accepted liability in these two areas than have accepted liability for defective roadways.

It should also be noted that none of the thirty states which retain the common law rule of governmental immunity has accepted liability in the area which gives rise to the greatest number of injuries—the negligent acts of governmental employees. However, among the exceptions which have developed, the most significant and widely adopted is the acceptance by the governmental body of liability to the extent of insurance coverage for the negligence of its employees. Since liability is limited to the extent of insurance coverage, it appears that the states adopting this exception are attempting to balance the need of the public for protection from bearing the expense of tortious injuries inflicted by governmental employees with the interest of the state in avoiding suits that might prove costly.

In balancing the interest of the state in remaining free from suit with the need to protect the public from bearing the burden of injuries inflicted by the negligence of governmental employees, twenty states have reacted affirmatively by either abrogating or substantially altering the rule of governmental immunity. It should be noted, however, that no jurisdiction accepts complete liability for the tortious conduct of its employees. Even in jurisdictions which have abrogated the immunity, it has been necessary to create exceptions which effectively preserve to the political entities immunity from suit. It would appear that in certain areas the consensus is that the state must retain its immunity in order to function effectively without fear of liability.

IV. CONCLUSION

Since it is apparent that the present status of governmental immunity in Texas is inadequate and since the Texas Legislature has the power to correct this inadequacy,²¹⁴ the question becomes one of finding the appropriate statutory scheme to achieve this purpose. For example, judicial

²¹⁴ See text accompanying notes 63-150 *supra*.

abrogation of governmental immunity in 1961 by the Supreme Court of California²¹⁵ forced the legislature of that state to fashion a comprehensive legislative solution. Immediate response to the court's action by the California Assembly was a two-year moratorium during which a careful legislative study of the problem was undertaken. As a result of that study, the California Assembly enacted a comprehensive statutory scheme in 1963 which reflects sound principles that should be considered in any legislative plan which alters the tort immunity of the state and its political subdivisions.

The basic principle underlying the California solution is the need to balance the legitimate interest of the public with that of the state. The private individual should not be required to bear the burden for injuries sustained as a result of the tortious conduct of public employees. At the same time, the state has an interest in not being subjected to the overwhelming burden of suits and payment of resulting claims which might follow total abrogation of immunity. The interest of the state was served in California by legislation which states that "[e]xcept as otherwise provided by statute a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee"²¹⁶ Thus, the state is protected since the common law of immunity is statutorily preserved, and suits cannot be brought unless consent is given by the General Assembly in the form of exceptions created by legislative act. On the other hand, the legitimate needs of the public are met in this statutory scheme by a broad legislative exception to such immunity, which provides for liability for injuries proximately caused by an act or omission of an employee of a public entity within the scope of his employment.²¹⁷ Since this exception is broad enough to cover the area in which most injuries occur, the public no longer bears the major burden for the torts of public employees.

Although this discussion is an over-simplification of the solution adopted in California,²¹⁸ it reveals a practical option to total abrogation of the immunity. The courts of Texas should be opened to those who are injured through the tortious conduct of the employees of political entities; however, total abrogation of the doctrine, without exception thereto, appears to be an improper approach to the problem. In every jurisdiction in which the doctrine of immunity has been abrogated, it has been necessary for the courts or the legislature to create exceptions and to preserve state immunity in specific areas. Thus, it appears that statutory enactment of governmental immunity accompanied by an exception providing for liability for negligent acts or omissions of public employees within the scope of their employment constitutes the first major portion of a practical legislative plan altering governmental immunity.

Accompanying this exception, which provides that political entities

²¹⁵ *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 359 P.2d 457 (1961).

²¹⁶ CAL. GOV'T CODE § 815 (West 1966).

²¹⁷ *Id.* § 815.2.

²¹⁸ The California statutory scheme covering governmental immunity is exhaustive. See *id.* §§ 810-996.6.

are liable for the negligent acts or omissions of government employees, a provision for the acceptance of liability for the negligent operation of motor vehicles by government employees is appropriate. While the acceptance of liability for negligent acts may be construed to cover negligent operation of a motor vehicle, its specific inclusion provides unquestionable legislative intent in an area where the potentiality for injury to private individuals is greatest.

The acceptance of liability for injuries caused by the defective condition of highways, roads, bridges, and public buildings is also appropriate. Not only should the public be protected from bearing the burden for injuries caused by the negligence of public employees, but the private individual should be able to make use of public facilities (roadways and buildings) without bearing the expense for injuries caused by their defective condition.

It should be noted that the acceptance of liability in the areas suggested—(1) negligent act or omission of government employees, (2) negligent operation of motor vehicles, (3) defective roadways, and (4) defective public buildings—necessitates the further creation of exceptions to liability in these four areas. The experience of other jurisdictions has shown that the acceptance of liability in these four areas in broad terms places liability on the state in areas in which the state has a legitimate need to retain its immunity. Thus the following exceptions appear relevant: (1) no liability for intentional torts of public employees, (2) no liability for damages caused by judicial or legislative acts, (3) no liability for injuries caused by emergency vehicles unless gross negligence is shown, and (4) no liability for defective roadways or buildings in the absence of actual or constructive notice of the defect. With the availability of this wide range of exceptions, the limitations which should be imposed depend upon the extent to which the legislature desires to protect the private individual from the burden of the tortious conduct of public employees.

Legislative enactment of the common law doctrine of governmental immunity accompanied by specifically tailored exceptions thereto grants substantial protection to the public without subjecting the political entities of the state to unreasonable litigation and claims. Since this should be the appropriate goal of any future legislation which alters the doctrine of governmental immunity, a legislative plan based on the considerations discussed above should reap the benefit of the experiences of a number of jurisdictions which have also attempted to solve the problem.